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Nos. 82-1951 and 82-1913

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

40pp.

MOTION TO AFFIRM

GEORGE P. PARKER, JR.,
Counsel of Record
LEWIS T. TARVER, JR.
CHARLES J. FITZPATRICK
One Alamo Center
106 S. St. Mary's Street
San Antonio, Texas 78205
(512) 226-4211
Attorneys for San Antonio Metropolitan Transit Authority

Of Counsel:
MATTHEWS & BRANSCOMB

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QUESTIONS PRESENTED

1. Whether *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. V 1981) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because it is performing a traditional governmental function?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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Appellee San Antonio Metropolitan Transit Authority ("SAMTA"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the judgment is plainly correct under controlling Supreme Court decisions.

STATEMENT

This is a direct appeal from a final judgment entered on February 18, 1983, holding that the minimum wage and overtime provisions of the FLSA cannot be constitutionally applied to SAMTA and to local public mass transit systems in the United States. SAMTA does not challenge the jurisdiction of this Court under 28 U.S.C. § 1252 (1976).

An Historical Overview Of The FLSA, As Applied To The States

The FLSA, as originally enacted in 1938, prescribed minimum wage and overtime compensation requirements for employees engaged in commerce or the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban, or interurban electric railway[s], or local trolley or motorbus carrier[s]." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways and trolley and motorbus carriers having gross revenues of one million dollars or more; an overtime exemption for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of such entities having gross revenues of less than one million dollars. *Id.* § 9. The exemption for public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals, and

related institutions, and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency. . . ." Pub. L. No. 89-601, §§ 102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to $250,000, and the overtime exemption was changed to cover operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendment extending coverage to public schools and hospitals was held constitutional. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local government employees and, in stages, to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 60, 68 (1974). The constitutionality of the amendments applying the FLSA to state and local government employees was challenged in a landmark case in which this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl 3." *National League*, 426 U.S. at 852. The Court did not identify all state activities that are constitutionally protected, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. In overruling *Maryland* v. *Wirtz*, the Court also extended constitutional immunity to schools and hospitals. 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the three-judge court recognized that this Court's decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). The court expressed concern over potential monetary liability of government employers in this gray area, and in response, the Secretary of Labor issued regulations (29

C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

The Proceedings In This Case

By letter dated September 17, 1979, to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League* . . . ." On November 21, 1979, SAMTA filed this action for a declaratory judgment that the minimum wage and overtime provisions of the FLSA are inapplicable to its operations. SAMTA's operators then brought a separate action for alleged unpaid overtime and liquidated damages. The employees' action was stayed pending disposition of the constitutional issue in this suit. The Secretary of Labor counterclaimed against SAMTA for back-pay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to intervene.

On November 17, 1981, the district court held that local public mass transit systems constitute integral operations in areas of traditional governmental functions under *National League* and entered summary judgment in favor of SAMTA and APTA. Gov't Jurisdictional Statement App. C. A direct appeal was taken to this Court, which vacated the district court's decision and remanded for "further consideration"[1] in light of its intervening decision in *United Transportation Union* v. *Long Island Rail Road*, 455 U.S. 678 (1982) ("LIRR"). *Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

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[1] In his jurisdictional statement (pp. 5, 6), Garcia incorrectly states that this case was remanded for "reconsideration" in light of *LIRR*.

On February 18, 1983, the district court rendered its decision on remand and reentered summary judgment in favor of SAMTA and APTA.[2] The court articulated the question before it as "whether public transit is one of 'the *numerous* line and support activities which are well within the area of traditional operations of state and local governments.' " Gov't App. 3a (emphasis in original). The court found that the "record of state regulatory activity indicates that mass transit has traditionally been a state prerogative and responsibility, not a federal concern," and that "[u]nlike the railroad in *LIRR*, . . . neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity." Gov't App. 6a, 7a. The court also concluded that "[t]he states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the [*National League of Cities* v.] *Usery* functions," and that "Congress [has] recognized the similarities between public transit and the *Usery* functions." Gov't App. 12a, 13a. The court rejected the contention that partial federal funding of public transit defeats *National League* immunity because the federal funding statute for transit "is an exercise of the Congressional Spending Power," "federal funding supports each of the *Usery* functions," and "the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity." Gov't App. 14a, 16a.

The district court also rejected the "[p]ervasiveness of government performance of a function" and a "function's ori-

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[2] The district court first issued its decision on February 14, 1983, but subsequently withdrew it and substituted the memorandum opinion that is the subject of this appeal. A copy of the district court's decision (*San Antonio Metropolitan Transit Authority* v. *Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983)) has been reproduced as Appendix A to the Government's jurisdictional statement and is cited in this motion as "Gov't App." Garcia's jurisdictional statement, although reciting that the district court's opinion is reproduced as Appendix A, instead has reproduced the court's withdrawn February 14 opinion.

gins in the private sector" as bases for distinguishing transit from the functions exempted by this Court in *National League* and cited statistics showing that governmentally owned hospitals, which this Court specifically exempted in *National League*, would not be exempt under such a test. Gov't App. 16a, 17a. Finally, the court concluded that transit satisfies the four immunizing factors set out in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979): transit "benefits the community as a whole"; it "is provided at a heavily subsidized price"; transit "services cannot be provided at a profit"; and "government is today the primary provider of transit services." Gov't App. 18a, 19a.[3]

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[3] Four federal appellate courts have considered the question whether public transit is constitutionally exempt from the FLSA. In *Molina-Estrada* v. *Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982), the court held that a highway authority which had the power to operate a mass transportation system (and intended to build one) and which operated parking lots and charged a fee for the use of its highways, was exempt under *National League* because these activities, among others, were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities." *Id.* at 845. Relying upon *Amersbach*, the court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the parks, recreation and public health activities mentioned in *National League of Cities* itself." 680 F.2d at 846. *National League* immunity was denied by the courts in *Alewine* v. *City Council of Augusta, Ga.*, 699 F.2d 1060 (11th Cir. 1983), *petition for cert. filed sub nom. City of Macon* v. *Joiner*, 51 U.S.L.W. 3884 (U.S. June 6, 1983) (No. 82-1974) and *Kramer* v. *New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983), and summary judgment on this issue was reversed in *Dove* v. *Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983). *Alewine* and *Kramer* were based on an historical approach, which was eschewed by this Court in *LIRR*, and on federal funding under the Urban Mass Transportation Act, *infra*, which was foreclosed by this Court's unanimous decision in *Jackson Transit Auth.* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982). *Dove* relied in large part on this Court's denial of certiorari in *Kramer* and federal funding of transit.

Facts About Public Transit In San Antonio[4]

Publicly owned transit has existed in San Antonio since 1959, when the City of San Antonio acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS"). The City's purchase was financed by revenue bonds, and no federal funds were involved in the acquisition.

In 1973, the Texas Legislature enacted article 1118x, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1982-1983), which authorizes the establishment of metropolitan rapid transit authorities and provides that they constitute "public bod[ies] corporate and politic, exercising public and essential governmental functions . . . ." *Id.* § 6(a).[5]

SAMTA was created under article 1118x by the City Council of San Antonio on February 3, 1977. An election was held on November 8, 1977 among "the qualified voters within the authority" (*id.* § 5(d)), confirming SAMTA's creation and authorizing SAMTA to levy a one-half percent sales tax. SAMTA then purchased the facilities and equipment of SATS from the City of San Antonio and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used in the purchase.

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[4] Unless another citation is given, the facts are taken from the affidavit of Wayne Cook, which is part of the record below.

[5] Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares subject to approval by a local government approval committee; make all rules and regulations governing the use, operation and maintenance of the system; issue bonds and notes; levy and cause to be collected motor vehicle emission taxes; levy, collect and impose a local sales and use tax subject to a local election; and levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution. *Id.* §§ 6, 6E, 7, 8, 11A, 11B. An authority *must* provide service to incorporated cities and unincorporated areas adjacent to its service area if the electorate of such adjacent city or area votes for annexation into the authority. *Id.* § 6A.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers over more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementary, junior high, high school and college students, and children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans.

SAMTA is operated almost entirely with local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging (when this case was first briefed below) from no charge for the smaller El Centro buses that circulate through the downtown area, up to 60¢ per ride for the longest runs, with children, the elderly and the handicapped paying 10¢. The average fare was 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were about $10.1 million, compared to operating expenses for such services of about $41.6 million.[6] SAMTA had an operational deficit of about $31.5 million, which was satisfied from sales taxes totalling approximately $26.8 million, operational grants of approximately $12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately $.7 million.

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[6] Fares thus constituted less than 25% of SAMTA's operating expenses for its first two fiscal years. In comparison, user charges as a percent of total costs in 1976-77 in the nation's 48 largest cities for other activities exempted by *National League* were 38% for sewage, 34% for hospitals and 27% for institutions of higher education. Institute of Pub. Admin., *Financing Transit: Alternatives for Local Government*, 228 tab. 10-2 (1979, prepared for the U.S. Dep't of Transp.).

ARGUMENT

I. TRANSIT IS A TRADITIONAL FUNCTION

In *National League*, this Court held that the States' power to determine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845. It identified the question before it as whether determinations of wages, hours and overtime "are 'functions essential to [the States'] separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. The Court discussed the effect the FLSA amendments would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented . . . ." *Id.* at 851.[7] The Court then held that "application [of the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" in activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* The Court observed that "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' " *Id.*[8]

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[7] This was reaffirmed in *EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1063 (1983).

[8] The Government's jurisdictional statement (p. 21; see also pp. 10, 25) contends that for public transit to be exempt under *National League*, it must be "an essential aspect of the states '*separate* and *independent* existence.' " In making this argument, the Government has misread *National League*, which posited the question before it as follows:

> One undoubted attribute of state sovereignty is the States' *power to determine* the *wages* which shall be paid to those whom they employ in order to carry out their governmental functions, what *hours* those

After *National League*, the only task remaining for the courts in FLSA cases is to complete the "catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16. Thus the issue before the Court is whether SAMTA (and local public mass transit generally) is one of these traditional functions. Transit is not materially different from the other activities exempted in *National League*, and the

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> persons will work, and what *compensation* will be provided where these employees may be called upon to work overtime. *The question we must resolve* here, then, *is whether these determinations are " 'functions essential to separate and independent existence,' "* [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them.

426 U.S. at 845-46 (emphasis added).

In answering this question in favor of the States, the Court established the principle that the power of the States to make wage and hour determinations *is* a function essential to their separate and independent existence and that Congress cannot regulate the States' prerogatives in this area when an integral or traditional activity of government is involved. The "separate and independent existence" test referred to by the Government has nothing to do with the determination whether an activity is traditional, but rather goes to the question whether the particular federal regulatory scheme itself unconstitutionally impairs state prerogatives that are essential to separate and independent existence—such as, in *National League*, the prerogative to prescribe wages and hours; in *LIRR*, the power to regulate railroad labor relations; and, in *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), the right to discriminate on the basis of age. *National League* has already determined that the FLSA's interference with the States' right to set the wages and hours of public employees "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," *EEOC* v. *Wyoming*, 103 S. Ct. at 1062, thereby endangering the States' separate and independent existence, and that issue accordingly is not present in this case. The validity of SAMTA's position in this regard is underscored by the fact that parks and recreation (which *National League* listed as traditional) could not be exempt under the Government's erroneous formulation; nor could hospitals and refuse collection (sanitation) in view of the substantial private sector involvement in those activities. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), would not meet the test for immunity asserted by the Government in this case.

district court's decision finding transit to be exempt is entirely consistent with *National League* as well as the Court's unanimous decisions in *LIRR* and *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

A. Transit Satisfies The Tests For *National League* Immunity Articulated In *United Transportation Union* v. *Long Island Rail Road*, 455 U.S. 678 (1982).

In *LIRR*, the Court held that the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), can be constitutionally applied to a "[state-owned] railroad engaged in interstate commerce," but acknowledged that "under *most* circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 685, 686 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's decision turned support the decision below.

In *LIRR*, the Court focused upon four crucial attributes of railroads, which do not exist in the case of local transit: (1) railroads are part of a national rail network requiring uniform federal regulation; (2) railroads have been subject to comprehensive, long-standing federal regulation; (3) railroads have no comparable history of state regulation; and (4) the railroad in *LIRR* was only one of two state-owned passenger railroads in the United States. The Court also emphasized that the Long Island Railroad voluntarily operated for years under the Railway Labor Act without any claim of disruption. The facts and authorities which follow demonstrate that each of these elements is inapplicable to SAMTA.

1. Transit Is Not Part Of A National Transportation Network.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. Thus, the Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the

country [,] . . . supplies Long Island's only freight service [and] does a significant volume of freight business." 455 U.S. at 680 n.1. The Court concluded:

> [T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. Congress determined that the most effective means of preventing such disruptions is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees.
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> . . . To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

Id. at 688-89.

In contrast, SAMTA provides a purely local service. It serves only Bexar County in which two-thirds of its passengers are going to or from work or school. During its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.[9] SAMTA also serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from the Administration's plan to eliminate transit operating subsidies:

> Primary responsibility for mass transit should remain with State and local governments. *Decisions about* serv-

[9] In this respect, SAMTA is engaged in an activity integral to education.

> ice levels, equipment and facilities, fares, *wage rates* and management practices *are better left to local decision-makers*. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions.

Major Themes & Additional Budget Details Fiscal Year 1983 at 121 (Executive Office of the President, Office of Mgmt. & Budget 1982) (emphasis added); *see also Major Themes & Additional Budget Details Fiscal Year 1984* at 81-82 (Executive Office of the President, Office of Mgmt. & Budget 1983).

Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other transit systems serving other localities around the nation.

The Government's reference in its jurisdictional statement (pp. 18, 19) to the Urban Mass Transportation Act's (49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) ["UMTA"]) characterization of the decline of transit services as a problem requiring a "nationwide program" and the Government's portrayal of public transit as a "venture in 'cooperative federalism' " between the States and federal government does not enhance its position one whit since Congress has made the same observations about virtually all of the other activities exempted by *National League*.[10] Examples are:

Health and Hospitals: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.* (1976 & Supp. V 1981), establishes a "joint

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[10] For the same reasons, the Government's reliance (jurisdictional statement p. 20 n.24) on the fact that some transit systems are "areawide" or "operate across state lines" is also misplaced. *E.g.*, S. Rep. No. 96-96, 96th Cong., 1st Sess. 33-34, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 health service areas, 15 are interstate, one is tristate and 13 encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, *reprinted in* 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of Interior should "encourage interstate and regional cooperation in the planning, acquisition, and development of outdoor recreation resources"); *History of Public Works in the United States 1776-1976* at 416, 418 (American Public Works Ass'n 1976 [referred to herein as "*History of Public Works*"]) ("[i]nterstate compacts have offered a more effective means of promoting regional water pollution control" . . . the 1948 Water Pollution Control Act (Pub. L. No. 80-845, 62 Stat. 1155 (1948)) provided for "interstate cooper-

Federal-State system for assuring compliance with these standards" (H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974, 42 U.S.C. § 300k, *et seq.* (1976 & Supp. V 1981) will "assure the development of a national health policy"; Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (current version at 42 U.S.C. § 291, *et seq.* (1976 & Supp. V 1981)), providing for hospital construction, was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act, Pub. L. No. 89-272, Title II, 79 Stat. 997 (1965), requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State, and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope" (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. V 1981)).

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ation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3615, 3634 (federal financial assistance is needed to encourage and help the states and interstate agencies undertake surveys of solid waste and develop plans on a "statewide or interstate basis" . . . "interstate and interlocal cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide waste treatment management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [solid waste disposal] regions"); Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 200 (1973) (amended 1979) (providing for "interstate metropolitan regional planning units").

Education: The "purpose" of the Elementary & Secondary Education Act of 1965, 20 U.S.C. § 236, *et seq.* (1976 & Supp. V 1981) "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 93-470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Comm'n on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "[t]here are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805).

Each of these "national" problems has received congressional attention and support. Yet, each is exempt from FLSA coverage.

2. Transit Has Not Been Subject To Comprehensive And Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 455 U.S. at 687. The Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation.*" *Id.* (emphasis added).

Unlike the "national rail system," *LIRR*, 455 U.S. at 688, federal regulation of transit has been no greater than that governing the activities specifically exempted by *National*

League. There is no scheme of federal regulation designed to provide uniformity among transit systems, as in the case of railroads, which are subject to an array of industry-specific federal laws.

The Government's argument (jurisdictional statement pp. 22-26) that the federal government has adopted comprehensive, long-standing regulation of transit finds no support in the federal statutes it cites.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), and therefore the Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976 & Supp. V 1981) (see definition of "employer," *id.* § 402(e)), apply to the activities specifically exempted in *National League* when performed by private sector employers. *E.g.*, *Crestline Memorial Hospital Association, Inc.* v. *NLRB*, 668 F.2d 243 (6th Cir. 1982); *Florence Volunteer Fire Department, Inc.*, 265 NLRB No. 134 (1982); *Champlain Security Services, Inc.*, 243 NLRB 755 (1979); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977); *Tulane University*, 195 NLRB 329 (1972); *Oakland Scavenger Corp.*, 98 NLRB 1318 (1952). A law of general application that regulates virtually every private employer in the country, including those activities (*e.g.*, hospitals, schools and sanitation) exempted in *National League* that have substantial private sector involvement, cannot be equated with the comprehensive federal statutes specifically regulating railroads. In fact, in view of the almost universal applicability of the NLRA to employers in the United States, the Government's argument would impose the "static historical view of state functions" shunned by this Court in *LIRR*, 455 U.S. at 686, since any new activity undertaken by a state—no matter how necessary or important—would be denied Tenth Amendment protection if it was previously performed to any degree by the private sector.[11] Furthermore, as

[11] The all-encompassing breadth of the NLRA is evident from the fact that it applies even to the local activities of charitable and beneficent organizations. *E.g.*, *Cincinnati Ass'n for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir.), *cert. denied*, 103 S. Ct. 78 (1982) (sheltered workshop for blind workers);

noted by the district court (Gov't App. 9a), the NLRA "contains an exemption for state and local governments." It would indeed be an anomaly to deny Tenth Amendment protection to the States based upon a statute that Congress specifically decreed shall not apply to the States.

The Government also relies on the fact that the Equal Pay Act (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. V 1981)) apply to transit. This logic is circular because those same statutes apply to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce* v. *Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying Equal Pay Act to a public hospital).

The Government's reliance on the 1961 and 1966 FLSA amendments is misplaced. Private transit systems were by statute exempt before 1961, and therefore during the first twenty-three years of its existence, the FLSA was totally inapplicable to transit. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but even then exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators. It was not until 1976 that even private transit was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, whose constitutionality is challenged in this very action, and which accordingly cannot provide bootstrap sup-

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NLRB v. *Southeast Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428 (9th Cir. 1982) (nonprofit organization that trains the handicapped); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (church-operated center for battered, abused and neglected children); *Rhode Island Catholic Orphan Asylum*, 224 NLRB 1344 (1976); *Salvation Army*, 225 NLRB 406 (1976); *Boys & Girls Aid Society of San Diego*, 224 NLRB 1614 (1976) (nonprofit residential treatment for emotionally disturbed children); *Children's Village, Inc.*, 186 NLRB 953 (1970) (nonprofit home for delinquent children).

port for the Government's position. The vast majority[12] of private and public transit employees have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal regulation of wage and hour practices or any other aspect of transit operations.

3. There *Is* Long-Standing State Regulation Of Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry."[13] 455 U.S. at 688. The reverse is true of transit in Texas and San Antonio.

State and local regulation of transit in Texas dates back at least 70 years. In 1913, an enabling act was passed by the Texas legislature delegating to the cities exclusive control over their streets and highways, including the powers:

> To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to

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[12] During SAMTA's first fiscal year, operators' salaries and wages were approximately $6.62 million or about 69% of $9.6 million in total salaries or wages, which shows that the majority of SAMTA's employees are operators. Garcia's Appendix below at 62. *See also Amendments to the Fair Labor Standards Act: Hearings on S. 763, et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 89th Cong., 1st Sess. 314 (1965) (referred to herein as "*Hearings on S. 763*"), which shows that of 54,697 total transit employees, 38,597 (70%) were operating personnel.

[13] The Government's argument (jurisdictional statement pp. 16-17) that state regulation of transit is not an appropriate consideration thus improperly disregards an important element of the test for immunity articulated in *LIRR*.

> provide for the giving bond or other security for the operation of the same.
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> To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire.
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> . . .

1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963).

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate all types of vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the city for transporting passengers for hire on city streets; established license application and fee specifications and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate fares, routes, schedules and franchises of private transit companies until 1959, when it created SATS and purchased the assets of SATS' predecessor pursuant to a state law authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963 & Supp. 1982-1983). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility. Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Supp. 1982-1983). The history of transit in San Antonio, from a city-controlled private franchise, to a city-owned system in 1959 and to an autonomous metropolitan authority in 1978, illustrates the traditional role

of the city and state in providing and regulating efficient transportation for the convenience and welfare of local citizens.[14]

4. State And Local Government Are The Principal Providers Of Transit

In finding the Long Island Railroad not to be a traditional function of state government, this Court noted that only two of seventeen commuter railroads in the United States were public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 455 U.S. at 681. The other was the Staten Island, which became public in 1971. *Id.* at 686 n.12. *See also Employees of the Department of Public Health & Welfare* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden* v. *Terminal Railway Co.*, 377 U.S. 184 (1964) was "a rather isolated state activity").[15]

In *LIRR*, the Court stated that it was not imposing a "static historical view of state functions generally immune from feder-

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[14] Other Texas statutes regulating intracity bus systems are Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing governing bodies of cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982-1983, *original version at* 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663c (Vernon 1977 & Supp. 1982-1983) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982-1983) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles required to be registered); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of motor vehicles used as school buses); art. 6698 (Vernon 1977) (authorizing incorporated towns to collect city permit fees on motor vehicles transporting passengers for hire).

[15] Commuter railroads are not even considered part of mass transit. "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' *except commuter railroads* and limousine service. . . ." Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 95 (1971) (emphasis added).

al regulation." 455 U.S. at 686.[16] The decision of the district court extending immunity to SAMTA and public mass transit applied the same principle.

Local transit in San Antonio has been publicly owned and operated since 1959. In 1979 all eighteen municipal transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service were publicly owned or operated. *1979 Texas Transit Statistics* 1 (Tex. Dep't of Hwys. & Pub. Transp. 1980). Nationally, 94% of all transit riders use public mass transit. APTA, *Transit Fact Book 1981* at 27. The figures in the Government's jurisdictional statement (p. 14 n.17) showing that roughly half of the 686 transit systems in urban areas over 50,000 population are public is misleading since those 686 systems include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urban areas in the United States and in at least 100 of the 106 urban areas having populations exceeding 200,000 is public. *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service*

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[16] In its jurisdictional statement (p. 18), the Government contends that *LIRR* held that "historical evidence is of paramount importance." The quotation in the text from *LIRR* repudiates this contention and is in keeping with earlier Supreme Court pronouncements. *E.g., Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978) ("[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions"); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955) ("it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("There cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . . [T]he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires").

in Urbanized Areas Over 50,000 Population (Dep't of Transp. 1981) (referred to herein as "*DOT Directory*").[17]

It is also clear that the States regard transit "as [an] integral part[] of their governmental activities," which is another test for *National League* immunity. 426 U.S. at 854 n.18.[18] Article 1118x provides that metropolitan transit authorities are "essential governmental functions"[19] and are not "proprietary." *Id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) provides that "public transportation is an essential component of the state's transportation system. . . ."

Perhaps most apposite to transit are the Court's observations in *Brush* v. *Commissioner of Internal Revenue*, 300 U.S.

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[17] The Government's attempt (jurisdictional statement p. 15) to equate public mass transportation with commuter railroads conflicts with the position it took in its amicus brief in *LIRR*. For example, on page 12 of that brief, the Government insisted that the Long Island Railroad "remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable from conventional intraurban transit systems.*" (emphasis added). The Government contended that this distinction "is firmly grounded in the separate histories of these two sectors of the transportation industry, in the applicable law, and in the usages of the industry," *id.* at 25 n.19, and contrasted the two public commuter railroads (out of seventeen) with the more than 1000 transit systems in the United States, "nearly half of [which], including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies." *Id.* at 27 n.20. The Government cited these statistics in support of its contention that "public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads." *Id.*

[18] As noted by the district court (Gov't App. 13a), the fact that public transit is an essential governmental activity, no different from the other activities exempted in *National League*, is evident from the legislative histories of the federal urban mass transit legislation, which equated transit with such essential public necessities as water, sanitation, police and fire protection, hospitals and education.

[19] Examples of "other state laws decreeing public mass transit to be an essential function of government" are cited in the district court's memorandum opinion. Gov't App. 12a n.7.

352 (1937), tracing the evolution of private water service into an essential function of government:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions. . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as nonexistent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are nonetheless so because the use of them has had a recent beginning.

Id. at 370-71.[20]

Although public transit, like water service, was once largely a function of private enterprise, it has evolved into an essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-six years ago.[21] *See also Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the

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[20] The question in *Brush* was whether the salary of a city official was subject to federal income taxes. The Court concluded it was not, based upon its holding that the city was performing an essential governmental function in furnishing water to the public. Although the Court's ruling on the income tax question is no longer valid in view of subsequent decisions upholding federal taxation of local government officials even when they are performing sovereign governmental functions, the Court's comments, quoted in the text, remain timelessly valid.

[21] For this reason, *Helvering* v. *Powers*, 293 U.S. 214 (1934), relied upon by the Government (jurisdictional statement p. 17), is inapposite. *Powers* was written 49 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost ex-

"terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times").

5. SAMTA Has Never Acceded To FLSA Coverage.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the Railway Labor Act and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 455 U.S. at 690. When the Long Island Railroad was sued for a declaratory judgment that the Railway Labor Act rather than the New York Taylor Law applied, its response "was to acknowledge that the Railway Labor Act applied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law." *Id.* at 681.

Unlike the Long Island Railroad's acceptance of the Railway Labor Act, SAMTA has never accepted FLSA coverage of its operations. When the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling that local transit is constitutionally within the FLSA, SAMTA promptly brought this action challenging the deputy administrator's ruling.

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clusively by the States as an "integral part[] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service[] which their citizens require," *id.* at 847. The States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Burger, C. J., concurring). *See also Reeves, Inc.* v. *Stake*, 447 U.S. 429, 449-52 (1980) (Powell, J., dissenting) (noting distinction between the " 'State as government and the State as trader,' " *id.* at 450). To compare the street railway in *Powers* as it existed in 1934 with the modern taxpayer-subsidized transit services that urban residents demand as an indispensible governmental service is tantamount to comparing the automobile with the horse and buggy.

B. Transit Systems Are Analogous To Hospitals.

As noted by the district court, "[a]nalogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity." Gov't App. 11a. Although public transit has much in common with all of the other exempt activities, comparison with the hospital industry makes it clear beyond a peradventure that transit is exempt.

Public sector involvement in hospitals is not as well established as in the transit field. For example, in 1980, of this nation's 7,051 hospitals, only 2,562 (36%), including federal facilities, were under government control. *Statistical Abstract of the United States 1982-83* tab. 171, at 111 (U.S. Dep't of Commerce, Bureau of Census, 1982). By comparison, in 1981, 598 (58%) of the 1,025 transit systems of all sizes were owned by state or local governments.[2] As a further comparison, a 1965 Senate Hearing Report states that "[t]here are 79 cities in which the dominant transit system is publicly owned and operated . . . [whose] employees . . . represent approximately 56% of the total employees in the local transit industry." *Hearings on S. 763* at 309. Almost 10 years later, in 1974, "56% of all hospital employees" worked for "non-public hospitals." S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3948. Hospitals have their roots in the private sector, and to this day are primarily private:

> The hospitals established in the eighteenth and nineteenth centuries were constructed and run by proprietary groups and church and other nonprofit organizations. This form of ownership remains the predominant characteristic of United States medical facilities.

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[2] *DOT Directory* 19; U.S. Dep't of Transp., A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service 13 (1981).

Federal funding has also played a significant role in the development of hospitals. Before 1946, more than 1,000 counties in the nation had no health facilities at all. A. Treloar & D. Chill, *Patient Care Facilities: Construction Needs and Hill-Burton Accomplishments* 11 (1961). In 1946, the Hill-Burton Act, *supra*, was passed to improve the situation, and more than half of hospital construction accomplished under that Act has been in areas with no hospital facilities. Treloar, *supra*, at 12, 14. "[R]oughly, 42 per cent of the county hospitals in operation in 1956 opened" after the end of World War II, and "[u]ndoubtedly, much of this latter growth was due to the federal grants for hospital construction received under the terms of the Hill-Burton Act of 1946. . . . In the state of Texas alone, fifty-three such institutions were founded in the interval from 1946 to 1956." J. Hamilton, *Patterns of Hospital Ownership and Control* 76 (1961).

In its jurisdictional statement (p. 14), the Government notes that some public transit systems have management contracts with outside concerns. The same arrangement exists with hospitals. In 1980, investor-owned firms held 150 management contracts with city or county hospitals. *City, County Contracts Lead to Hospital Sales*, Modern Healthcare, Sept. 1980 at 44. The most rapid growth in this area has occurred in municipal and county owned facilities and includes the 1,300-bed Cook County Hospital in Chicago, J. Goldsmith, *Can Hospitals Survive?* 114 (1981), and the 1465-bed John J. Kane Hospital in Pittsburgh, Mannisto, *For-Profit Systems Pursue Growth in Specialization and Diversification*, Hospitals, Sept. 1, 1981 at 72. Moreover, unlike public transit systems, which have become predominantly publicly owned, many public hospitals are selling out to private operators. Hull, *How Ailing Hospital in South Was Rescued by a For-Profit Chain*, Wall St. J., Jan. 28, 1983, at 1, col. 1. Furthermore, hospitals have long been subject to the very same statutes cited by the Government as regulating transit. In fact, when *National League* was decided, there had been more extensive FLSA coverage of hospitals and schools since both activities were brought totally under the FLSA in 1966, whereas public tran-

sit was given an overtime exemption for operating employees until 1976. Yet, this Court had no difficulty in exempting both hospitals and schools under the Tenth Amendment.[23]

C. Federal Funding of Transit is Irrelevant.

In its jurisdictional statement (pp. 18-20) the Government challenges *National League* immunity on the ground that funds provided under UMTA allegedly hastened the public takeover of transit systems. This contention draws absolutely no support from *National League* or *LIRR*, it constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case, and it is invalidated by this Court's decision in *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City bought the San Antonio Transit Company's assets in 1959, five years *before* federal grants were available. SAMTA acquired SATS' equipment and facilities in 1978 through the issuance of bonds payable only out of local revenues—not out of federally provided funds.

More importantly, this Court's decision in *Jackson Transit* forecloses the Government's federal funding argument. In that case, a unanimous Court rejected a transit union's claim that through the grant of UMTA funds Congress intended to regulate transit labor relations. The Court specifically held that "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations be-

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[23] Data regarding the exempt activity of solid waste collection (sanitation) provides analogous reenforcement for the Tenth Amendment immunity of public transit. In 1975, private firms collected residential refuse in 67% of 2,060 cities of all sizes surveyed, 61.4% of which relied entirely on private firms. E. Savas, *The Organization and Efficiency of Solid Waste Collection* 45, 63 (1977). "Waste disposal is one of today's hot new glamour industries . . . [which] has become a $10 billion business. . . ." Blyskal, *Glittering, Glamorous Garbage*, Forbes, June 8, 1981 at 156.

tween local governmental entities and transit workers." *Id.* at 27. It follows that receipt of those very same funds cannot abrogate the Tenth Amendment rights of those same governmental entities, particularly since nothing in UMTA requires compliance with the FLSA. *See Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").[24]

In arguing that UMTA grants affect transit's *National League* immunity, the Government is really making a Spending Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended $60.5 billion in assistance to the States, including $716 million for law enforcement assistance. *Id.* at 878.[25]

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[24] *See also* § 9(d) of UMTA (49 U.S.C. § 1608(d) (Supp. V 1981)), which prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant."

[25] Even if UMTA funding were taken into account, local government's use of federal funds to acquire transit operations as a necessary step to ensure continuation of an essential local service is not materially different from federal subsidization of other local government activities which are exempt under *National League*. For example, between 1973 and 1981, $33.3 billion was appropriated for wastewater treatment plant construction, which was second only to federal-aid highway programs in terms of federal public works expenditures. *Municipal Wastewater Treatment Construction Grants Program: Hearings on S. 975 & S. 1274 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 97th Cong., 1st Sess. 7, 16 (1981). This is almost three times the $13 billion in federal aid to transit which the Government (jurisdictional statement p. 19) claims were made by 1978. An activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to *State Activities in Solid Waste Management, 1974* at iii (EPA, Office of Solid Waste Mgmt. Programs 1975) "[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." See

II. THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT A CONSTITUTIONALLY VALID AMENDMENT[25]

The necessary result of *National League* is to remove the great majority of state and local government employees from the provisions of the FLSA. Although the FLSA has a severability clause (29 U.S.C. § 219 (1976)), which creates a presumption that unconstitutional provisions of the FLSA are severable, *see INS* v. *Chadha*, 103 S. Ct. 2764, 2774-76 (1983), that clause does not authorize the application of the FLSA, which has been held unconstitutional as to a majority of the class of public employees it was intended to cover, to the

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also discussion, *supra*, regarding the role of federal funds in the development of public hospitals.

During fiscal 1980 (the last year for which such data could be found), over $445 million in federal grants were made to local governments and private entities and individuals in Bexar County. This included approximately $6.4 million in construction grants for wastewater treatment works, $.9 million for parks and recreation, $44.6 million for education, $96.8 million for health and human services, $47.9 million for housing and urban development, $23.6 million for comprehensive employment and training programs, $2 million for airports, $9.5 million for UMTA capital and formula grants, and $15.8 million for revenue sharing. *Geographic Distribution of Federal Funds in Texas* 17-20 (Community Serv. Admin. 1980). In fiscal 1982, federal aid to Texas and its political subdivisions was $3.73 billion. *Federal Aid to States Fiscal Year 1982* at 1 (Dep't of the Treasury, Fiscal Service-Bureau of Gov't Fin. Operations, Div. of Gov't Accounts & Reports (1983)). This sum included approximately $190 million for elementary and secondary education, *id.* at 8; $173 million for construction of wastewater treatment works, *id.* at 10; $682 million for medical assistance, *id.* at 11; $8 million for law enforcement assistance, *id.* at 17; $20 million for airport and airway trust fund, *id.* at 19; $78 million for UMTA assistance, *id.* at 21; and $233 million in general revenue sharing, *id.* at 21.

[25] This question was pled and briefed in the proceeding below, but the district court did not pass on its merits. The Court may consider that issue since "an appeal under 28 U.S.C. § 1252 brings the 'whole case' before the Court." *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975); *accord*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977).

remainder of the class, thereby creating a program different from the one Congress actually adopted.[27]

In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), a three-judge district court had declared a Pennsylvania statute, which provided for reimbursement of funds for nonpublic education, to violate the First Amendment's establishment clause because it applied to sectarian schools. Although the state law contained a severability clause, the court declined to sever out sectarian schools because "so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools." *Id.* at 834. The Court was asked to declare the provision severable and allow tuition reimbursement for parents of children attending schools that were not church-related. The Court declined the invitation because "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." *Id.*

Recently, in *Brockett* v. *Spokane Arcades, Inc.*, 454 U.S. 1022 (1981), the Court affirmed the Ninth Circuit's decision (631 F.2d 135 (1980)) that the unconstitutionality of injunction and closing order provisions of a Washington moral nuisance law required invalidation of the entire statute despite the presence of a severability clause. Relying on *Sloan*, the court of appeals had held that the elimination of a vital part of the statutory scheme would eviscerate the statute and create a

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[27] Extension of the 1974 FLSA amendments to public employees not excluded by the *National League* holding would also result in judicial reformulation of the amendments to add words of limitation (codifying this Court's "traditional governmental function" holding into the FLSA's definition of "public agency") where none presently exist. A severability clause does not intend for courts "to dissect an unconstitutional measure and reform a valid one out of it by inserting limitations it does not contain [since] [t]his is legislative work beyond the power and function of the court." *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922) (involving a severability clause indistinguishable from the one in the FLSA).

program quite different from the one actually adopted. This Court affirmed by memorandum.

National League withdraws from FLSA coverage a major part of the class of public employees which Congress intended to include. The FLSA sets up no dichotomy between traditional and nontraditional governmental functions, and therefore to reframe the statute to incorporate such a distinction would create a program different from the one Congress actually adopted. *See also Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975). *INS* v. *Chadha*, 103 S. Ct. 2764 (1983) does not require a different result. Congress relied on this Court's decision in *Maryland* v. *Wirtz*, 392 U.S. 183 (1966) when it extended the FLSA to the entire public sector, and it presumably did not intend to enact a program covering only a small number of public employees. *See* H. R. Rep. No. 93-913, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2816-17; *see also* 118 Cong. Rec. 24,240, 24,749 (1972).

CONCLUSION

SAMTA respectfully submits that the judgment of the district court is manifestly correct and should be summarily affirmed. If the Court concludes that summary affirmance is inappropriate, then the case should be briefed and argued.

Respectfully submitted,

GEORGE P. PARKER, JR.,
Counsel of Record
LEWIS T. TARVER, JR.
CHARLES J. FITZPATRICK
One Alamo Center
106 S. St. Mary's Street
San Antonio, Texas 78205
(512) 226-4211
Attorneys for San Antonio Metropolitan Transit Authority

Of Counsel:
MATTHEWS & BRANSCOMB

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